2005

State of Utah v. Christopher Sean Kearns : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
CHRISTOPHER SEAN KEARNS,	:	Case No. 20050940-CA
Defendant/Appellant.	:	

BRIEF OF APPELLEE

An appeal from a conviction and judgment on a plea of No Contest to Intoxication, a class C misdemeanor, in violation of UTAH CODE ANN. § 76-9-701(1997), in the Fifth District Court, Washington County, State of Utah, the Honorable James E. Shumate, Presiding. This appeal is taken from the ruling regarding discovery by the Honorable Pat B. Brian denying defendant free copies of discovery documents.

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JURISDICTIONAL STATEMENT

Defendant appeals after a conviction for one count of intoxication, a class C misdemeanor, in violation of Utah Code Ann. § 76-9-701 (1997). This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(e).

STATEMENT OF THE ISSUE

Was it error for the district court to deny defendant's request for free photocopies of discoverable documents?

STANDARD OF APPELLATE REVIEW

This court should grant the district court "broad discretion to admit or deny discovery under [Rule 16 URCrP]." ***State v. Mickelson***, 848 P.2d 677, 687 (Utah

App. 1992). However, the court may "reverse the lower court's ruling when the court's decision is based upon an erroneous interpretation of the Rule or any of its provisions." ***Id.*** The district court ruling is reviewed for correctness. *State v. Spry*, 21 P.3d 675, 676 (Utah App. 2001).

STATUTES RULES AND CONSTITUTIONAL PROVISIONS

The text of the following determinative provisions is included in *Addendum A*

U.S. Const., Amend. XIV – Due Process Clause;
Utah Const. Art. I § 12 – Rights of Accused Persons;
Utah Code Ann. § 17-53-211 – Fees for Services – Exceptions;
Utah Code Ann. § 77-1-6 – Rights of Defendant;
Utah Rules of Criminal Procedure – Rule 16 – Discovery.

STATEMENT OF THE CASE

The defendant was originally charged in the Fifth District Court, Washington County, Utah, with Kidnapping (Domestic Violence), a second degree felony; Assault (Domestic Violence), a class B misdemeanor; and Intoxication, a class C misdemeanor (R. 1-2). On September 5, 2005, the domestic violence charges were dismissed at the request of the state, and the defendant entered a plea of guilty to Intoxication, a class C misdemeanor.

STATEMENT OF FACTS

After charges were filed, the defendant retained counsel and filed a Motion for Discovery (R. 11-13). The State responded, providing a copy of the Information and listing of all documents in the possession of the State, with a

notice that the defendant could examine all such items at the Washington County Attorney's Office, and could make copies of any items defendant wished to have. The cost for such copies would be $5.00. In lieu of defendant coming to the prosecutor's office, the State offered to provide copies of all documents for a copying charge of $5, and denied that other items sought by the defendant were discoverable. (R. 14-16)

Defendant and his counsel chose not to examine the evidence or to request copies, and instead sought an order on his motion for discovery, and no other substantive issues relating to the charges where held while defendant pursued this order. This issue was assigned to the Honorable Pat B. Brian of the Third District Court, Salt Lake County, West Valley Department, who found that the State was required only to provide to the defendant the information and probable cause statement (R. 122-127).

The defendant had already received the Information, and made no request for a probable cause statement, choosing instead to request permission for an interlocutory appeal on this issue (R. 128-131). The Honorable Gregory K. Orme denied defendant's petition without prejudice (R. 144), the defendant paid the $5 copying fee under protest, and the discovery documentation was provided to defendant (R. 151-153).

The case was reset for preliminary hearing on September 2, 2005. However, by this time the State was unable to locate the alleged victim or obtain her cooperation, so at the September 2, 2005, hearing the State moved to dismiss the kidnapping and assault charges and the trial court accepted defendant's conditional No Contest plea to the charge of Intoxication, a class C misdemeanor (R-160-161).

The issues of the criminal charges were now fully resolved, but following entry of the final judgment (R. 162-165), a Notice of Appeal was filed October 3, 2006, appealing Judge Brian's order regarding the $5.00 fee paid by defendant under protest, which appeal was assigned to the Utah Court of Appeals (R 163-165).

SUMMARY OF ARGUMENT

Defendant claims the trial court erred in not ordering the state to give him photocopies of discovery documents at no cost. Defendant has no constitutional property right to free copies of discovery documents in possession of the state. Furthermore, defendant is not being required to advance money or fees to secure a constitutional right prior to judgment.

Discovery documents were disclosed to defendant, through an offer to have the defendant inspect those documents or pay a fee to have the documents photocopied and sent to defendant. Defendant was not forced into a particular

alternative. The State's discovery obligation is to make known or divulge discovery information, not deliver free copies of discovery documents.

The state did not intentionally withhold information required in discovery. The state responded to discovery and revealed what information it had in its possession. Defendant was told how to further view the discovery information or get it copied.

The state has a statutory mandate to set fees for services. The photocopying fee is reasonable and established by law.

ARGUMENT

POINT I

THE FEDERAL AND UTAH STATE CONSTITUTIONS AND STATE STATUE DO NOT REQUIRE THE STATE TO PROVIDE A DEFENDANT FREE COPIES OF DISCOVERABLE MATERIAL.

A five-dollar flat fee for non-indigent defendants to receive photocopies of discoverable materials is not prohibited by constitutional law.

(A) The Constitution of the United States Does Not Require the State to Provide a Defendant with Free Copies of Discoverable Materials.

There is no property right at stake when imposing a five-dollar copy fee or discovery materials. Defendant asserts that the Fourth, Sixth and Fourteenth Amendments do not allow the state to charge the fee. The fee does not deprive defendant "of life liberty or property, without due process of law." U.S. Const., Amend. XIV § 1. As defendant concedes, there are alternative methods provided to him for viewing discovery materials. ***See*** States Response to Defendants Request for Discovery attached as *Addendum B*, (R.14-15). Defendant is not being "forced" into any particular option to view discoverable material. The option to have copies made for defendant is for the convenience of defendant. Nothing in the amendments to the U.S. Constitution cited by defendant otherwise make copies of those materials a property right.

While novel, defendant does not provide any precedent for the idea that the copy fee constitutes a Bill of Attainder, under U.S. Constitution Article I § 9. Without more, defendant's *belief* that the fee amounts to a 'bill of pains and penalties' is without merit. "Mere allusion to state constitutional claims, unsupported by meaningful analysis does not permit appellate review." ***State v. Dudley***, 847 P.2d 424, 426 (Utah App.1993). While defendant's claim is brought under the federal constitution, the same logic expressed in Dudley should apply here.

(B) The Utah State Constitution and Utah Code Do Not Prevent the State From Charging a Five-Dollar Copying Fee.

Article I § 12 of the Utah Constitution, Rights of Accused Persons, provides, "[i]n no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. Utah Const. Art. I § 12, attached as *Addendum A*. Utah Code § 77-1-6 similarly states that [n]o accused person shall, before final judgment, be compelled to advance money or fees to secure rights guaranteed by the Constitution or the laws of Utah, or to pay the costs of those rights when received." Utah Code Ann. 77-1-6(2)(b), *Addendum A*. Defendant is not being compelled to advance money or fees to secure his right to discovery materials. Rule 16 of the Utah Rules of Criminal Procedure (URCrP) reads, in pertinent part:

Rule 16. Discovery.

(a) Except as otherwise provided, the prosecutor shall *disclose* to the defense upon request the following material or information of which he has knowledge:
  (1) relevant written or recorded statements of the defendant or codefendant;
  (2) the criminal record of the defendant;
  (3) physical evidence seized from the defendant or codefendant;
  (4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and
  (5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

URCrP Rule 16(a)(1-5), (emphasis added), attached in *Addendum A*.

Nothing in the Rule 16 provisions above requires the state to provide, free of charge, copies of discoverable material. Defendant erroneously equates the word 'disclose' to a requirement to provide free copies. Black's Law Dictionary refers to disclosure as "[t]he act or process of *making known* something that was previously unknown; a revelation of facts. BLACK'S LAW DICTIONARY (8th ed. 2004), (emphasis added), attached as *Addendum D.*

More on point with the issue of discovery, disclosure is defined as "[t]he mandatory *divulging of information* to a litigation opponent according to procedural rules." ***Id.*** (emphasis added), *Addendum C.* These definitions suggest that the process of discovery can be accomplished by making known or divulging

information mandated by Rule 16 URCrP, in any reasonable manner available, including allowing defendant to view the states file or receive copies for a fee.

The disclosure requirement under Rule 16 URCrP cannot be synonymous with receiving copies. Photocopying of all discovery materials is not practical or even possible in some cases. Rule 16(3) requires disclosure of "physical evidence seized from the defendant or codefendant." URCrP 16(3). This disclosure requirement cannot be achieved through photocopying. In cases where physical evidence is held, the existence of the physical evidence would usually be disclosed to and defendant would be given the opportunity to examine the evidence. Only certain written documents and arguably some photographic material lend themselves to photocopying.

Additionally, defendant's argument that he has a constitutional right to free copies of discovery materials is limited to photocopies. The state also charges a fee for copies of audio and videotapes. ***See***, Washington County Ordinance No. 2003-838-0, attached as *Addendum D*, (R. 63-74). At what point does defendant's alleged constitutional right to free copies of discovery materials end?

(c) The Rule 16 Disclosure Requirement Has Not Been Interpreted to Mean "Provide Free Copies".

Courts have suggested different methods for disclosing discoverable material. The case law cited by defendant does not support his proposition that disclose requires free copies of discoverable material. Defendant cites to ***In the Matter of***

the Petition of the State of Delaware for a Writ of Mandamus, 708 A.2d 983 (Del. 1998), (Br.Aplt at 15). This case uses the term *produce* instead of *disclose* when referring to the prosecutors discovery obligation under ***Brady v. Maryland,*** 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). Nowhere in this case did the court indicate that *produce* meant to give free copies to of Brady material to the defendant. To the extent that Brady material exists, the state has an obligation to disclose in detail its existence. It is up to the defendant to decide whether to view the Brady material in the states file or obtain copies of that material.

Defendant also cites ***State v. Knight***, 734 P.2d 913(Utah 1987), (Br.Aplt at 20). The ***Knight*** court used the terms *disclose* and *produce* when describing the prosecutor's discovery obligation. ***Id.*** at 916-917. However, ***Knight*** stops short of explaining how that discovery obligation to produce or disclose information should be accomplished.

The state does not dispute its obligation to furnish certain information to the defense as part of its discovery obligation, including informations and witness lists. The state has met that obligation in its first written responses to discovery. *Addendum B,* (R. 14-16). However, disclosure, or "[t]he mandatory divulging of information..." BLACK'S LAW DICTIONARY (8^{TH} ed. 2004) does not require the state to copy all discoverable material free of charge. As long as the state has identified what it has in its possession and defendant has been given the

opportunity to view the state's file free of charge, as an alternative to obtaining photocopies, the state has met its discovery disclosure requirement.

POINT II

THE STATE DID PROVIDE DEFENDANT WITH DISCOVERY INFORMATION AT NO COST AND DID NOT INTENTIONALLY WITHHOLD ANY DOCUMENTS.

The flat fee for discovery is limited to those items that need to be photocopied. As stated above, the state submitted a timely response to discovery, listing witnesses, items it had in its possession and providing the information that was filed in the case. (R. 14-16). Defendant is also put on notice that he may come to the county attorney's office and inspect the items listed or receive copies of those items that con be photocopied, by paying the $5.00 flat fee. Nothing in the state's response is an attempt to limit its obligation to disclose pertinent information to defendant.

The state did not give the defendant a copy of the probable cause statement immediately after Judge Pat B. Brian's ruling was handed down. That may have been in error, but it was not intentional. The record is void of any suggestion that the state intentionally withheld or refused to turn over a copy of the probable cause statement, as defendant claims. (Br.Aplt. at 15).

The defendant also argues that he had a right to a free photocopy of a one-page fax the state had in its possession, indicating there was not a Board of

Pardons warrant issued for the defendant that was ultimately helpful to the defendant. (Br.Aplt. at 14).

Defendant does not provide any support for this argument. The one-page fax document is not part of the record. There is nothing in the record to indicate that the court relied on the any information in the fax, how and when it may have affected the setting of bail, or how it ultimately was beneficial to defendant. The fax was actually a hand written note stating that there was not a Board of Pardons warrant, but there was a hold on defendant from the Adult Probation and Parole. ***See,*** Fax from Washington County Sheriff's Office, attached as *Addendum E.*

Defendant suggests that the fax was exculpatory evidence under ***Brady v. Maryland,*** 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215(1983), (Br.Aplt at 17). Defendant fails to explain how this one-page fax "would tend to exculpate him or reduce the penalty..." that he might face. ***Id.*** at 87-88. Regardless, there is an insufficient record on this document to adequately argue any claims here.

POINT III

THE FLAT FEE FOR PHOTOCOPIES IS REASONABLE AND IS PROVIDED FOR IN THE UTAH CODE.

While the flat fee may mean some defendants will pay more on a per page basis, depending upon the number of pages copied, it does not make the fee unconstitutional or unreasonable.

The flat fee for copies is offered to defendants as a convenience to them. If a defendant believes there are a limited number of discoverable item that will need to be copied, he may come to the county attorney's office and select only those materials to copy, and pay the $0.25 per page fee. ***See*** Washington County Ordinance No. 2003-838-0 (pg 2), *Addendum C*, (R63-74). A defendant may choose not to copy any of the discoverable material, once it is examined. Otherwise, the state will prepare and photocopy discovery and send it to the defendant in exchange for paying the flat fee.

The flat fee was established as a reasonable means of addressing the cost of providing services to a defendant. On an earlier challenge to the flat fee, the Washington County Attorney explained the rational for the fee.

> [C]harging a flat $5.00 fee for photocopies of discovery would be an appropriate way of offsetting the Office's photocopy costs. I decided that $5.00 would be appropriate even though it does not cover actual costs and administrative expenses. I decided on a flat fee simply to minimize the administrative expense of keeping track of and billing for the actual number of copies.

See Affidavit of Eric A. Ludlow, ¶ 7, in ***State v. Martin***, Case No. 981501276, attached as *Addendum F*, (R. 60-62).

The forgoing rationale illustrates that the flat fee was thought through and was the most reasonable and practical means to address growing photocopying costs at the Washington County Attorney's Office.

The fee is also established pursuant to law, under Utah Code § 17-53-211.

> The legislative body of each county shall adopt an ordinance establishing fees for services provided by each county officer, except:
> (1) fees for the recorder, sheriff and county constables; and
> (2) fees established by statute.

Utah Code Ann. § 17-53-211 (2000).

With this statutory mandate the Washington County Commission adopted an ordinance that, in part, created a fee schedule for the Washington County Attorney's Office, as follows:

Photocopies (b/w 8 ½ X 11)	$0.25 per side
Cassette Tape	$5.00
Video Tape	$15.00
Discovery	$5.00

See, AN ORDINANCE SETTING FEES FOR SERVICES IN WASHINGTON COUNTY OFFICES, DEPARTMENTS AND FACILITIES, Ordinance No. 2003-838-0, *Addendum D.*

The Utah Supreme Court has given legislative bodies considerable latitude in establishing fees. "[F]ixing the amount of a fee is a legislative act to which we grant great deference. Such fees are presumed reasonable, and the burden is on the party challenging the fee to prove the fee is unreasonable." ***V-1 Oil Company v. Utah State Tax Commission,*** 942 P.2d 906, 917 (Utah 1996). Furthermore, "a fee may exceed the cost of providing intended service and remain reasonable. Fee-setting bodies are entitled to flexibility in their legislative solutions to problems." ***Id.***

The Washington County Commission was well within its statutory authority in establishing a fee for photocopies of discovery materials. Given the administrative expense and copying costs of providing defendant with photocopies of discovery, the $5.00 flat fee is very reasonable.

In ***Walker v. Brigham City***, the Utah Supreme Court stated that it "defers to a [legislative body's] judgment unless it has acted outside its authority or its actions are such that they are arbitrary and capricious. 856 P.2d 347, 349 (Utah 1993). The defendant has not met its burden to show that the flat fee is unreasonable or arbitrary and capricious; therefore, the court should defer to the discretion given the Washington County Commission.

CONCLUSION

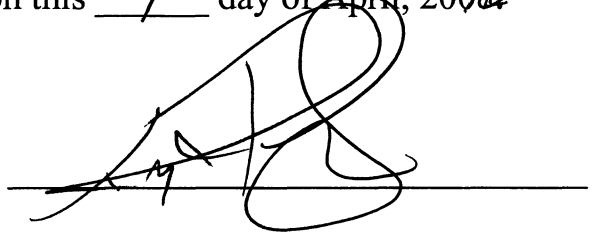
For the reasons set forth above, this court should affirm the district court's ruling, denying defendant copies of discovery documents, without paying a fee.

4/7/06
Date

RYAN J. SHAUM
Deputy Washington County Attorney

CERTIFICATE OF MAILING

I hereby certify that on I mailed two true and correct copies of the foregoing Brief of Plaintiff/Appellee were mailed to GREGORY SAUNDERS, 50 East 100 South, Suite 101, St. George, Utah 84770, on this 7 day of April, 2006.



Addenda

Addendum A

Utah Constitution

Article I, Section 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Utah Code Annotated 1953, as amended

77-1-6. Rights of defendant.

(1) In criminal prosecutions the defendant is entitled:

(a) To appear in person and defend in person or by counsel;

(b) To receive a copy of the accusation filed against him;

(c) To testify in his own behalf;

(d) To be confronted by the witnesses against him;

(e) To have compulsory process to insure the attendance of witnesses in his behalf;

(f) To a speedy public trial by an impartial jury of the county or district where the offense is alleged to have been committed;

(g) To the right of appeal in all cases; and

(h) To be admitted to bail in accordance with provisions of law, or be entitled to a trial within 30 days after arraignment if unable to post bail and if the business of the court permits.

(2) In addition:

(a) No person shall be put twice in jeopardy for the same offense;

(b) No accused person shall, before final judgment, be compelled to advance money or fees to secure rights guaranteed by the Constitution or the laws of Utah, or to pay the costs of those rights when received;

(c) No person shall be compelled to give evidence against himself;

(d) A wife shall not be compelled to testify against her husband nor a husband against his wife; and

(e) No person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when trial by jury has been waived or, in case of an infraction, upon a judgment by a magistrate.

Enacted by Chapter 15, 1980 General Session

U.C.A. 1953 § **17-53-211**

West's Utah Code Annotated Currentness
Title 17. Counties
Chapter 53. County Executive, Legislative Body, and Other Officers
Part 2. County Legislative Body

→§ 17-53-211. Fees for services--Exceptions

The legislative body of each county shall adopt an ordinance establishing fees for services provided by each county officer, except:

(1) fees for the recorder, sheriff, and county constables; and

(2) fees established by statute.

Laws 2000, c. 133, § 120, eff. May 1, 2000.

LIBRARY REFERENCES

Counties ⚿77.
Westlaw Key Number Search: 104k77.
C.J.S. Counties § 109.

U.C.A. 1953 § **17-53-211,** UT ST § **17-53-211**

Current through end of 2005 First Special Session

END OF DOCUMENT

Rule 16. Discovery.

(a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:

(1) relevant written or recorded statements of the defendant or codefendants;

(2) the criminal record of the defendant;

(3) physical evidence seized from the defendant or codefendant;

(4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and

(5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

(b) The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

(c) Except as otherwise provided or as privileged, the defense shall disclose to the prosecutor such information as required by statute relating to alibi or insanity and any other item of evidence which the court determines on good cause shown should be made available to the prosecutor in order for the prosecutor to adequately prepare his case.

(d) Unless otherwise provided, the defense attorney shall make all disclosures at least ten days before trial or as soon as practicable. He has a continuing duty to make disclosure.

(e) When convenience reasonably requires, the prosecutor or defense may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places. The prosecutor or defense may impose reasonable limitations on the further dissemination of sensitive information otherwise subject to discovery to prevent improper use of the information or to protect victims and witnesses from harassment, abuse, or undue invasion of privacy, including limitations on the further dissemination of videotaped interviews, photographs, or psychological or medical reports.

(f) Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, that limitations on the further dissemination of discovery be modified or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(g) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

(h) Subject to constitutional limitations, the accused may be required to:

(1) appear in a lineup;

(2) speak for identification;

(3) submit to fingerprinting or the making of other bodily impressions;

(4) pose for photographs not involving reenactment of the crime;

(5) try on articles of clothing or other items of disguise;

(6) permit the taking of samples of blood, hair, fingernail scrapings, and other bodily materials which can be obtained without unreasonable intrusion;

(7) provide specimens of handwriting;

(8) submit to reasonable physical or medical inspection of his body; and

(9) cut hair or allow hair to grow to approximate appearance at the time of the alleged offense. Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given to the accused and his counsel. Failure of the accused to appear or to comply with the requirements of this rule, unless relieved by order of the court, without reasonable excuse shall be grounds for revocation of pre-trial release, may be offered as evidence in the prosecutor's case in chief for consideration along with other evidence concerning the guilt of the accused and shall be subject to such further sanctions as the court should deem appropriate.